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In the Supreme Court
of the United States

OCTOBER TERM, 1967

No. 1349

ANNETTE LESLEY BUCHANAN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon made and entered in this case January 24, 1968.

CITATION TO OPINION BELOW

The Supreme Court of the State of Oregon filed an opinion, printed in Appendix B, page 26, which opinion is reported in 86 Or Adv Sh 81, – P2d – (1968).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was made and entered January 24, 1968. An order was entered, by that court, February 20, 1968, staying issuance of the mandate (in effect staying execution of the sentence) for such time as required to permit Petitioner to file a timely application with the Supreme Court of the United States for a writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1257 (3) 1948. The ground upon which the jurisdiction of this Court is invoked is that the state court has decided a federal question, relating to freedom of the press under the First and Fourteenth Amendments of the United States Constitution, adverse to the claim of petitioner.

QUESTIONS FOR DECISION

1. Under the facts of this case, did the Order of the state court directing the Petitioner, a newspaper reporter, to disclose her confidential sources of a published news story, and the imposition of punishment upon the Petitioner for refusing to disclose those sources, constitute a restraint or infringement upon freedom of the press?

2. Where an Order of a state court, requiring a newspaper reporter to disclose the identity of the sources of her news story operates to impair the free flow of information within the community, must the state court before imposing that Order weigh or balance the conflicting and competing interest of the need for disclosure as against the public's interest in the free flow of information and news?

3. What criteria should the state court consider in weighing or balancing the respective interests of the public where freedom of the press is involved?

4. Does an Order of a state court compelling a reporter to disclose her anonymous sources and punishing her for refusal to disclose them constitute a violation of freedom of the press as established by the First and Fourteenth Amendments to the United States Constitution where the reporter has instigated an investigation into an illegal activity for the purpose of publishing an article thereon, and: (1) in order to obtain interviews of those engaged in the activity, the reporter is required to and does pledge that their identities will not be disclosed; (2) the reporter herself has not witnessed the activity; (3) the activity is not one which involves an unwilling victim or participant; (4) lack of disclosure would not interfere with the right of any private litigant; and (5) the state has made no showing that the information sought from the reporter is necessary to the proper administration of justice or is not otherwise available to the inquiring body.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States, which are printed in Appendix A at page 25.

STATEMENT OF THE CASE

The Oregon Daily Emerald is the daily newspaper published by the Associated Students of the University of Oregon. Petitioner Annette Buchanan was employed by the Emerald as its managing editor. Her duties included the gathering of information for, and the writing of, news and feature articles (Tr. 132, 133). During the spring of 1966, the subject of the use of marijuana and drugs by students on the Oregon campus and on campuses across the nation was becoming a matter of great interest. The Emerald had run a series of articles furnished by the National Student Press Service on the subject, and lectures had been given on the campus by prominent individuals (Tr.9).

During this time Petitioner was approached by two students who felt that the Emerald's coverage had been one-sided. After discussing the matter with her editor, she decided to attempt to write a news article that would set out the "other side of the story" as told to her by people who had experienced the use of marijuana. She made an investigation and was enabled to arrange an interview with seven people. All seven claimed to be university students (Tr. 135-137, 141). As a result of this interview she wrote a story which was published in the Emerald, May 24, 1966, issue, under the caption, "Students Condone Marijuana Use" (Tr. 134 and Respondent's Exhibit 5-A). In order to obtain the interviews, and prior to the time the interviews commenced, she pledged to the seven individuals that she would do "everything" to keep the "entire source" confidential (Tr. 143).

Her article related that the seven students had used marijuana, none had found it harmful, and all had found its use pleasurable and intellectually stimulating. They considered it less dangerous and considered its use more desirable than the use of alcohol. The students interviewed were critical of the drug laws as they existed and were critical of the way in which they were administered. Much of their comment centered on the use of marijuana in the intellectual community, comparing the goals and ethics of that community with the goals and ethics of that part of society which uses alcohol. They were expressing opinions and beliefs which were intended to influence others that the existing laws relating to the sale and use of marijuana were without rational foundation and ought to be significantly changed.

Disclosure of their names or identities would have exposed them to punishment, or at least to harassment, by law enforcement agents and officers. Disclosure would also likely have subjected them to social and economic pressures of various kinds and degrees of severity.

She based her article on what these students told her. She

did not witness any crime or illegal activity. She had never used or possessed marijuana and to her knowledge had never seen it. She did not know how to identify it by sight, smell or taste.

After the article appeared, Petitioner and three other members of the staff of the Emerald were subpoenaed by the District Attorney for Lane County to appear before the Grand Jury. The three other students testified that they had no knowledge and could furnish no information of value. Petitioner in answering the questions put to her by the District Attorney, acknowledged that she had written the story (Tr. 7), claimed that it was an accurate account of interviews with real people, not a fictitious flight of her imagination (Tr. 10), and admitted that she knew the full names of most of her informants and the first name of one of them (Tr. 11). However, she refused to supply the names or any clues that might have led to disclosure of their identities.

There was substantial evidence, which was rejected, and not considered by the trial court, which tended to show that the inquiry by the Grand Jury was not being conducted for the purpose of inquiring into crime or criminal activity, but rather was retaliatory action by the then District Attorney for Lane County, William Frye, who had been during May, 1966, a candidate for the Democratic nomination for the United States Representative from Oregon's Fourth Congressional District, and had been opposed during his campaign by the editors of the Oregon Daily Emerald (Tr. 252, rejected, Exhibits 1, 3, 4 and 8, rejected, Exhibits 9, 6-a).

Other evidence rejected and not considered by the trial court established that the use of anonymous sources is essential to the gathering of news on controversial and sensitive subjects, especially criminal activities and other socially proscribed conduct. Because of this, a strong tradition exists in the profession of journalism that a reporter is never to reveal a confidential source.

HOW FEDERAL QUESTION PRESENTED

FIRST GRAND JURY HEARING

Petitioner appeared before the Grand Jury, pursuant to subpoena, and was questioned by the then Lane County District Attorney (Tr. 2-4). She answered all questions put to her except questions which would have tended to identify the individuals interviewed for the news story. She based her refusal upon the provisions of the State and Federal Constitutions guaranteeing freedom of speech and press, stating:

> "I refuse to answer that because it would be a breach of the canons of ethics if I started on this line of answering. *** I think it is beyond the proper scope of inquiry of the Grand Jury. Requiring me to answer is a violation of the provisions of the State and Federal Constitutions of freedom of speech and press, specifically the First and Fourteenth Amendments, and because I am not here represented by counsel, and I am entitled to such representation under the State and Federal laws —— constitutions." (Tr. 9)

And again:

> (Question by District Attorney) "All right, now you can recite again if you want for the record the reasons why you have refused to answer these questions."
>
> (Answer by Annette Buchanan) "Okay *** Requiring me to answer is a violation of the provisions of the State and Federal Constitutions of freedom of the press and speech, specifically the First and Fourteenth Amendments of the United States Constitution. *** "
>
> (Tr. 15)

The District Attorney then moved the court for an Order requiring Petitioner to answer the questions which would identify the sources of her news article. A hearing was held June 13, 1966, to determine whether the motion should be allowed.

HEARING – June 13, 1966

At the June 13, 1966, hearing, counsel for Petitioner contended that, on the facts of this case, she should not be ordered to give testimony identifying the individuals whom she interviewed for the purpose of obtaining the news story:

> Mr. Johnson: " *** Because to require her to answer in these circumstances would violate her rights and the rights of all of us as to the freedom of speech, the freedom of press which appear in the Federal Constitution, Article I, or the First Amendment, Fourteenth Amendment, also the Oregon Constitution, Article I, Section 8 *** " (Tr. 57, see also pp. 56-64). (See transcript for argument of counsel.)

The court entered an Order that the witness answer each of the questions that had been put to her (Tr. 8).

SECOND GRAND JURY HEARING

The Grand Jury convened again June 15, 1966, and Petitioner again declined to answer on the grounds that compelling disclosure was a violation of freedom of press under the First and Fourteenth Amendments to the United States Constitution.

> (Question by the District Attorney) "Are you refusing to tell the Grand Jury whether the two students that suggested there were (sic) another side were among the seven students that you ultimately talked to?"
>
> (Answer) "Yes. For the same five reasons I gave the last time I was here."
>
> (Question) "Well, you had better repeat your reasons."
>
> (Answer) "You want me to repeat my reasons?"
>
> (Question) "You may if you like."
>
> (Answer) "First that it would be a breach of the canons of ethics of journalism which state the reporter

will keep the news sources confidential. *** *Third, requiring me to answer would be in violation of freedom of press for both the State and Federal Constitutions.* Fourth, it is beyond the scope of inquiry of the Grand Jury – of the Grand Jury *** " (Tr. p. 136). (Emphasis added.)

The District Attorney then moved the court for an Order finding Petitioner guilty of criminal contempt and punishing her therefor. The matter raised by the motion was tried to the court June 27, 1966.

TRIAL

At the trial Petitioner contended in her testimony and in the argument and briefs filed by her counsel that she should not be required to answer and that she should not be found in contempt or punished for refusing to answer on the grounds that such order and such punishment would under the circumstances of the case be a violation of the constitutional provisions of freedom of speech and freedom of press under the State and Federal Constitutions (Tr. 219).

(Question) "Will you tell me why you declined to answer those questions?"

(Answer by Petitioner) "I decline to answer the questions for five basic reasons: *** (2) That requiring me to answer would be a violation of constitutional provisions of freedom of speech and freedom of press under the State and Federal Constitutions. *** "

Her attorney contended, in his argument, that:

" *** To require her to answer would violate the provisions of the First and Fourteenth Amendments of the U.S. Constitution, Article I, Section 8 of the Constitution of the State of Oregon" (Tr. 281).

In the brief filed in the trial court by counsel for Annette Buchanan she contended:

> "THE ORDER OF THE COURT, IN THE CIRCUMSTANCES OF THIS CASE, INFRINGED RESPONDENT'S FIRST AMENDMENT RIGHTS, WAS VOID, AND FAILURE TO COMPLY THEREWITH WOULD NOT CONSTITUTE CONTEMPT.
>
> "A. To require a journalist to disclose confidential sources in the circumstances of this case, would constitute an abridgment of freedom of speech and freedom of press guaranteed by the First Amendment of the Constitution of the United States and by Article I, Section 8 of the Constitution of the State of Oregon." (Citations and argument omitted.)
>
> " ***
>
> "TO PUNISH RESPONDENT FOR FAILING TO COMPLY WITH AN ORDER DIRECTING HER TO ANSWER WOULD IN THE CIRCUMSTANCES OF THIS CASE DEPRIVE HER OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW." (Citations and argument omitted.) (See brief filed in the trial court on behalf of Petitioner.)

The court found Petitioner in contempt of court (Tr. 330) and entered judgment requiring her to pay a fine in the sum of $300.00 or go to jail (Tr. 335 – Judgment, trial court file).

APPEAL

After conviction, Petitioner appealed to the Supreme Court of the State of Oregon, asserting that the trial court erred in ordering her to answer and in imposing punishment for her refusal to answer, in that, in the circumstances existing in this case, the Order and imposition of punishment violated freedom of the press as guaranteed by the First and Fourteenth Amendments of the United States Constitution. (See Abstract and Brief filed by Petitioner in the Supreme Court of the State of Oregon.)

The Supreme Court of Oregon affirmed the conviction, apparently holding that her claim did not have constitutional basis.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The freedoms of speech and press guaranteed by the First Amendment to the United States Constitution are freedoms that belong to all the people. Petitioner seeks redress from this Court because the holding of the Oregon Supreme Court in this case tends to restrict rather than protect the First Amendment guarantees. The right of the Petitioner, within the circumstantial framework of this case, to withhold the names of anonymous news sources is of merely secondary and collateral importance. The right of all the people to receive all the news is the principle being presented to this Court for reaffirmation.

> "Freedom of the press 'is not an end in itself, but a means to the end of a free society,'" Frankfurter, Jr., *Pennekamp v. Florida*, 328 US 331, 354, 90 L. Ed. 1295, 1308 (1946) (concurring opinion).

> "In this context, sanctions against either innocent or negligent misstatements would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc. v. Hill*, – US –, 17 L.Ed.2d 456, 468 (1967) (opinion by Justice Brennan).

Although basic First Amendment rights were affected by the trial court's Order requiring disclosure, the trial court failed to apply a balancing test, or to weigh the respective social interests involved. Rather, the court held that a reporter in every

instance, when subpoenaed before a Grand Jury, and despite any circumstances which may be existing in the particular case, has an absolute duty to disclose the identity of the confidential, anonymous sources of a published news article.

I.

FIRST AMENDMENT RIGHTS ARE INVOLVED

The exercise of the judicial contempt power to coerce disclosure of anonymous sources of information, which information was used in a published news story on a subject of legitimate public interest, constituted a substantial restraint on freedom of the press in this case.

News gathering is an inseparable part of the activity of the press protected by the First Amendment. In *Associated Press v. United States*, 326 US 1, 89 L. Ed. 2013 (1944), this Court held invalid a conspiracy in restraint of trade in news and news sources and stated that the First Amendment:

> " *** rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." 326 US at 20, 89 L. Ed. at 2030.

In *Griswald v. State of Conn.*, 381 US 479, 85 S.Ct. 1678, 14 L. Ed. 2d 510 (1965), this Court held:

> "The right of freedom of speech and press includes not only the right to utter or to print but the right to distribute, the right to receive, the right to read, and freedom of inquiry, freedom of thought, and freedom to teach – indeed freedom of the entire university community. Without these peripheral rights, the specific rights would be less secure."

See also *Lamont v. Postmaster General*, 381 US 301, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965), and *Estes v. Texas*, 381 US 532, 14 L. Ed. 2d 543 (1966).

Allowing compulsory disclosure of reporters' confidential, anonymous news sources, without a proper balancing of the

conflicting interests of the public, results in reporters refusing to risk writing articles based on information obtained from sources who have been promised anonymity, and will result in sources refusing to cooperate out of fear of revelation of their identities. This matter of common sense knowledge was taken notice of judicially in *In Re Taylor*, 412 Pa. 32, 193 A2d 181 (Pa. S. Ct. 1963):

> "It is a matter of widespread common and therefore of judicial knowledge that newspapers and news media are the principal sources of news concerning daily, local, state, national and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of derelictions of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to fully and completely protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption, and crime be preserved against piercing and erosion.
>
> "The District Attorney points out that such a construction of 'nondisclosure of source' will enable newsmen to conceal or cover up crimes. This is correct. However, we are convinced that the public welfare will be benefited more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure of the sources of newspaper information concerning a crime."

The same principle of which the Pennsylvania court took judicial notice in *In Re Taylor* was emphasized in this case by testimony of several highly experienced journalists including the Managing Editors of the Oakland Daily Tribune, the Eugene Register-Guard and the Wenatchee World, and the Dean of the School of Journalism of the University of Oregon. The testimony of all of these journalists was rejected by the trial court

(Tr. 160-164, 178, 150, 178) despite the fact that authors who have written on the subject have uniformly recognized the importance of anonymity in maintaining a free flow of news.

> "News channels which prove valuable in unearthing such examples of public scandals remain so only as long as the source remains secret. Honest officials, and occasionally dishonest persons, who can furnish necessary information, cannot afford to jeopardize their freedoms or their jobs by permitting their names to be used *** No community can afford to shut off these channels of information." Seibert & Ryniker, Editor & Publisher, Sept. 1, 1934, 36-37.

This Court in numerous decisions has recognized the value of anonymity in maintaining a free flow of information. *Talley v. California*, 362 US 60, 80 S. Ct. 536, 41 L. Ed. 2d 559 (1960). If anonymity cannot be preserved inviolate, to those desiring to express unpopular views and ideas, the mere threat of public exposure and potential harassment by law enforcement officials will operate as a substantial restriction on free speech and freedom of the press. The difference in this respect between those who espouse popular views and those who espouse unpopular views is described in a Note in 70 Yale L.J. 1084 (1961) at 1108:

> "Those who advocate popular views *** have little to fear from disclosure laws. Any reprisals against such popular views may bring down the wrath of the whole community. The rebels and heretics on the other hand, typically get no such support. They must bear the full brunt of disclosure and the concomitant community sanctions. For the advocate of popular views the 'light of pitiless publicity' is the spotlight thrown on the favored performer; for the dissenter it is the harsh glare of the third degree." (Citing: Chafee, *Free Speech in the United States* [1941]; Black, *The Bill of Rights*, 35 NYU L.R. 865, 880 [1960].)

This Court has also frequently recognized that a pledge of anonymity can be an absolute prerequisite to the free flow of information. Thus the Court has given its sanction to the time-honored practice of reliance by government officers upon confi-

dential informers as an aid to law enforcement activities. When a criminal defendant seeks to compel the government to disclose an informant's identity, "no fixed rule with respect to disclosure is justifiable." The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. *Roviaro v. United States*, 353 US 53, 62 1 L. Ed. 2d 639, 646 (1957).

It would appear to follow that if no fixed rule with respect to disclosure is justifiable when the government resists disclosure upon the basis of a common law testimonial privilege, so much less is it justifiable when a member of the press resists disclosure upon the basis of the First Amendment right to gather news and disseminate that news to the public. In the latter case, as in the former, it is essential to recognize that a hard and fast rule compelling disclosure can only serve to constrict the free flow of information which is vital to the ultimate protection of the public interest.

In *Garland v. Torre*, 259 F.2d 545 (1958) the Second Circuit Court of Appeals weighed the interest of a private litigant, Judy Garland, who had brought a defamation action against CBS, against the public's interest in receiving the kind of information which had been published by the reporter, Miss Torre. Miss Torre, on being deposed, had refused to identify the anonymous source of her information (a CBS official) upon which she based her article containing alleged defamatory statements concerning Judy Garland. In determining whether or not Miss Torre should be required to reveal her anonymous source, the Second Circuit Court of Appeals balanced the interest of a private litigant, Judy Garland, against the public's interest in dissemination of the news. In that case, the Second Circuit found that "the heart" of the private litigant's claim lay in disclosure of the libelant's identity; it further found that the public had a limited, if any, interest in receiving libelous and defamatory information and held, after applying a "balancing test" that the scale obviously weighed in Judy Garland's favor.

In that case, a petition for a writ of certiorari was filed with this Court but was denied. This is the only known instance where this particular constitutional issue has been brought directly to the attention of this Court. The writ of certiorari may well have been denied because the Second Circuit Court of Appeals did recognize the First Amendment issue and did balance the public's interest in court authority to compel the giving of testimony against the public's interest in receiving information and news via the press.

The facts in this case are clearly distinguishable from the facts in *Garland v. Torre*. In addition to properly balancing the public's competing interest in that particular case, the Second Circuit Court also may have decided correctly in favor of the private litigant's right to compel the reporter to disclose her anonymous source. The heart of Miss Garland's case was the identity of the source the reporter refused to disclose. Balanced against the public interest in having access to news stories containing possible defamatory and libelous information, the importance of preserving the right of a private litigant to her day in court weighed heavier.

The Oregon Supreme Court not only failed to recognize the importance of weighing the public's interest in compelling testimony at trial against the public's interest in protecting the anonymity of news sources so as to insure full news coverage, but it also, by setting up a straw man, avoided making any significant determination at all, and thereby affirmed the trial court's decision wherein the First Amendment question was almost completely ignored:

The precise holding of the Oregon Supreme Court is not clear. The court held either that (1) no constitutional issue is involved in this case; it is a question of whether or not a privilege should be granted to certain members of society, and that decision is properly legislative matter, or (2) that there may well be an important First Amendment issue involved in this case, but since it involves delineation of the persons who will not be

compelled to disclose anonymous sources, the issue should be faced by the Legislature and not the court. Whichever the court intended, the holding is most unsatisfactory. Petitioner does not assert any right of a reporter to a privilege, or even to a qualified privilege, such as statutory definition might allow. Contrary to the position of the state court, Petitioner urges that where the Constitution is involved, the courts must act, indeed it is their historical prerogative to act.

The state court erroneously assumed that Petitioner was seeking for the private preserve of the press the privilege of non-disclosure. The right that Petitioner is asserting in this case is the right of the public and all of its members to have access via the press to information, especially information on controversial subjects, some of which may well involve illegal activities. The purpose of the First Amendment freedoms of speech and press is to keep open and free-flowing the pipelines to the "market place of ideas." The people are the only losers when information and ideas do not reach the "market place."

> "*** the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . That, at any rate, is the theory of our constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge." *Abrams v. United States*, 250 US 616, 630, 63 L. Ed. 1173, 1180 (1919).

The problem which loomed large to the state court, viz., how to decide who is to be afforded the secondary and ancillary protection of not having to reveal his sources of information, is no different nor greater than, for example, the problem this Court has faced in determining who is a "focal suspect" and should therefore be protected from conviction by evidence obtained by the police prior to their informing him of his Fifth and Sixth Amendment rights. In many constitutional cases, protections are secondarily and ancillarily afforded some individuals in order that the whole of society might be more secure

in enjoying its fundamental freedoms. Booksellers have been the objects of such secondary protection as in the case of *Smith v. California*, 361 US 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, where this Court stated:

> "For if the bookseller is criminally liable without knowledge of the contents . . . he will tend to restrict the books he sells to those he has inspected; and thus, the State will have imposed a restriction upon the distribution of Constitutionally protected as well as obscene literature . . . and the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted." 361 US 147, 153-154, 4 L. Ed. 2d 205, 211.

This Court has long held that any substantial infringement of the freedoms of speech and press by the government, though the infringement may be indirect, is unconstitutional. Labeling an abridgment of freedom of speech or press as a "prior restraint" is no longer a prerequisite to seeking protection of First Amendment rights. *Bridges v. State of California*, 314 US 252, 62 S. Ct. 190, 86 L. Ed. 192, 206-207 (1941); *American Communications Assoc., CIO v. Douds*, 339 US 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950); *New York Times Co. v. Sullivan*, 376 US 254, 11 L. Ed. 2d 686 (1964); *Garrison v. Louisiana*, 379 US 64, 13 L. Ed. 2d 125.

First Amendment rights are involved in this case because application of the rule laid down by the trial court and affirmed by the Oregon Supreme Court would substantially interfere with the free flow of ideas and of information within the community. Application of the rule would effectively prohibit the use of anonymity which is one of the most basic tools of the news reporter.

Stories revealing crime or corruption or the existence of rackets, such as the one exposing Billie Sol Estes, would become less available to the public (Tr. 156). Stories revealing the wide divergence between existing law and community mores and practice, such as recent magazine articles disclosing the use of

marijuana and drugs by a great number of youth of this country, would not reach the public. Articles disclosing the extent and consequences of the practice of illegal abortions in this country could not be published. Many people with views adverse to the central attitudes of society would have no effective voice. Those who most need anonymity in order to be able to communicate would lose it. Those engaged in investigating and reporting and informing the public would lose their most effective tool.

Articles of vital importance based on anonymous sources are published every day. Application of the unqualified rule laid down by the trial court and affirmed by the state supreme court would, necessarily, either (1) prohibit the publishing of such articles or (2) require the reporter to investigate and publish at his peril, and in either event the rule would operate to diminish the information, the news, and the number of ideas available to the public.

II.

A BALANCING OR WEIGHING OF THE PUBLIC'S COMPETING INTERESTS IS REQUIRED IN THIS CASE

Where the people's right to freedom of speech or press is in issue, and in competition with, other rights of the people, and where these other rights are not demonstrably associated with the paramount concern of the people with national security or the common defense of the country, the courts have a duty to weigh and to balance the people's competing rights and interests, and to arrive at a decision which best accommodates the competing interests on the basis of their relative importance to attainment of the many different goals of our democratic government.

The rule requiring balancing of interests in First Amendment cases is basic and is of most general application: *Schneider v. State*, 308 US 147, 84 L. Ed. 155 (1939) (freedom of speech as opposed to a city's claim of power to control handbill distribution); *American Communications Association v. Douds*, 339 US 32, 94 L. Ed. 925 (1950) (governmental power with respect to the subject of employment relationships and prevention of industrial strife as opposed to freedom of speech); *NAACP v. Alabama*, 357 US 449, 2 L. Ed. 2d 1488 (1958) (the right of "association" for freedom of speech purposes as against judicially required compulsory disclosure of names for the enforcement of civil and criminal laws); *New York Times Co. v. Sullivan*, 376 US 254, 11 L. Ed. 686 (1964) (freedom of the press to print false and defamatory matter concerning a public officer's performance of his official duties, as opposed to the right of a state through its common law to permit recovery in a civil action by such officer for defamation without proof that the libelous statements were printed with actual knowledge of their falsity or with reckless disregard of the truth); *Garrison v. State of Louisiana*, 379 US 64, 13 L. Ed. 2d 125 (1964) (freedom of the press as against a state statutory law on criminal libel); *Time, Inc. v. Hill*, – US –, 17 L. Ed. 2d 456 (1967) (freedom of the press as against application of New York's "right of privacy" statute in a civil suit); *Talley v. California*, 362 US 60, 41 L. Ed. 2d 559 (1960) (the use of anonymity in the exercise of the freedom of the press as against compulsory disclosure of the identity of the publisher for enforcement of civil and criminal laws).

This Court, historically, has used several different "tests" to weigh competing interests where infringements of First Amendment rights have been asserted. "Redeeming social value," "clear and present danger," "compelling interest," and "preferred freedoms" are some of the phrases which have become a part of our constitutional law. Each of these phrases, however, involves a multiplicity of concepts. This Court's ap-

proach to the First Amendment freedoms has traditionally been that of "weighing" or "balancing" the competing interests of free speech, press and association against state actions impinging upon them.

> "More recently we have said that state action impinging upon free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling." *Talley v. California*, 363 US 60, 66, 80 S. Ct. 536, 4 L. Ed. 2d 559, 564 (1960), Harland, J., concurring.

Where civil liberties are at stake this Court has held that the state, in order to impinge upon them, must not only demonstrate a "cogent" and "compelling" interest in the subject matter, but it must show that a legitimate state end cannot be accomplished through less restrictive means. In *Shelton v. Tucker*, 364 US 479, 81 S. Ct. 247, 5 L. Ed. 2d 241 (1960) this Court said:

> "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

In *DeGregory v. Attorney General of New Hampshire*, 383 US 825, 82 S. Ct. 1148, 16 L. Ed. 292 (1966), the defendant was investigated by the Attorney General of New Hampshire concerning Communist Party activities, and was held in contempt for refusing to answer questions concerning those activities. This Court held that in the absence of a showing of "overriding and compelling state interest" in the information sought, the conviction could not be upheld. (16 L. Ed. 2d at 296)

Finally in *Wood v. Georgia*, 370 US 375 (1962) in setting aside a conviction of contempt of court for having interfered with a Grand Jury investigation, this Court held that the burden was on the State of Georgia to show how and in what manner the publications by the defendant interfered with the Grand Jury's investigation. The Court stated:

> " *** And when it is claimed that such liberties (freedom of speech and expression) have been abridged, we cannot allow a presumption of validity of the exercise of state power to interfere with our close examination of the substantive claim presented."

In contrast to the message of these cases, the trial court in this case refused to apply a balancing test or to weigh the competing interests involved. The trial judge refused to consider evidence tending to show that the inquiry was not a bona fide inquiry by the Grand Jury but was harassment by the District Attorney, his personal retaliation against those who had opposed him in his recent, unsuccessful bid for higher political office (Tr. 252, Ex. 1, 3, 4, 8, rejected, Ex. 9, 6a).

The trial judge refused to consider evidence tending to show the importance of anonymous sources to freedom of the press. Rather, it held that the state was unquestionably entitled, in every instance, to compel the revelation of anonymous sources because of the importance of obtaining information potentially useful in prosecuting persons who may be guilty of some crime. Evidence was offered and rejected that would tend to indicate that the District Attorney had no intention of prosecuting, but was simply seeking favorable publicity to enhance his public image (Tr. 252, Ex. 1, 3, 4, 8, rejected, Ex. 9, 6a).

Further, the trial court failed to make any distinction between cases where the reporter is an actual witness to a crime and where a reporter simply obtains, by means of an investigation conducted for the purpose of obtaining a news story, information of or about a crime(s). The trial court failed to make a distinction between cases where the information sought pertains to crimes involving violence and unwilling victims, and crimes that involve only willing participants. Finally, the trial court failed to require the state to make any affirmative showing, before ordering Petitioner to answer, that it did not have other access to the information sought from Petitioner, nor did the trial court require the state to make any showing that the information was necessary to the fair administration of justice.

The state supreme court, in affirming the Judgment, on the one hand appears to deny that an important First Amendment issue is involved in the case, yet, on the other hand, recognizes that a First Amendment issue is involved but declined to act upon the ground that there is a difficult definitional problem that cannot be undertaken by the court. The Supreme Court of the State of Oregon failed in its function by failing to balance or weigh the respective interests involved and by refusing to establish criteria which would guide the trial courts in future instances. Indeed, if this Court adopts the view of the Supreme Court of the State of Oregon, that difficult definitional problems must be left to the legislature, there will be little work left for the courts.

Chief Justice Warren, speaking for the Court in *Wood v. Georgia*, 370 US 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962), stated:

> "The administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the active cooperation of an enlightened public."

The investigating reporter works to enlighten the public, and in so doing performs a vital role in our free society. Our constitutional experience has taught us that the arguments of Madison and Jefferson are true – that a free society not only has nothing to fear from freedom of speech and press, but gains its strength from the diversity thereby produced. Laws should be enforced and citizens as well as law enforcement personnel have duties and responsibilities in that respect. But on balance, in circumstances such as exist in this case, society will benefit most by a rule which encourages the investigating reporter to continue to investigate and to report factually what he finds.

CONCLUSION

The central question presented in this case has not heretofore been determined by this Court, and the decision made by the state court herein is inconsistent with the related decisions which have been laid down by this Court. It is of great interest to the press and to the public that guidelines be established for the future. For the foregoing reasons this Petition for writ of certiorari should be granted.

Dated Eugene, Oregon
April 18, 1968

Respectfully submitted,

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APPENDIX A

UNITED STATES CONSTITUTION, AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

UNITED STATES CONSTITUTION, AMENDMENT XIV

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON
In Banc

State of Oregon,

Respondent,

v.

Annette Lesley Buchanan,

Appellant.

Appeal from Circuit Court, Lane County.

Edward Leavy, Judge.

Argued and submitted December 4, 1967.

Arthur C. Johnson, Eugene, argued the cause for appellant. With him on the briefs were Leslie M. Swanson, Jr., Edwin C. Thomas, and Johnson, Johnson & Harrang, Eugene.

John B. Leahy, District Attorney, Eugene, argued the cause and filed a brief for respondent.

William P. Rogers and Royall, Koegel, Rogers and Wells, New York, N.Y., filed a brief for the American Society of Newspaper Editors as *amicus curiae*.

Gerald J. Norville, Herbert M. Schwab, and Rives & Rodgers, Portland, filed a brief for Sigma Delta Chi as *amicus curiae*.

Keith D. Skelton, Eugene, filed a brief for the Oregon Newspaper Publishers Association as *amicus curiae*.

Before Perry, Chief Justice, and McAllister, Sloan, O'Connell, Goodwin, Denecke, and Holman, Justices.

GOODWIN, J.

Affirmed.

GOODWIN, J.

This is an appeal from a judgment of contempt of court. The only issue is whether freedom of the press[1] gives a newspaper reporter the constitutional right[2] to preserve the anonymity of an informer in the face of a court order requiring disclosure.

Conceding that neither she nor her informers had statutory[3] or common-law privileges,[4] Annette Buchanan, a writer for a student newspaper, asserted on constitutional and professional-ethics[5] grounds that she had the right, after a publication, to refuse to disclose the identity of her source of information.

The issue arose upon a court order in aid of a grand-jury investigation into the use of marijuana in Lane County. Miss Buchanan had promised seven persons who claimed to be marijuana users that if they permitted her to interview them for publication she would under no circumstances reveal their names. Miss Buchanan reported the results of the interviews, using fictitious names. This publication produced a well-publicized[6] confrontation with the then district attorney culminating in the proceedings which led to this appeal.

In the trial court, testimony and argument were addressed to the social value and professional desirability of the asserted privilege.[7] The trial court, however, was of the opinion that the asserted privilege was not a right of constitutional stature and that the public-policy questions were of a kind that should be left to the Legislative Assembly.[8] A fine of $300 was imposed.

Miss Buchanan seeks reversal on the ground that the constitutionally protected freedom of the press necessarily includes freedom to gather news. Since certain news stories cannot be obtained unless the reporter can promise anonymity to a confidential informer, she argues that a judicial order requiring disclosure abridges a protected freedom. The social values which favor a free press, she argues, should be judicially balanced against those which favor the discovery and prosecution of law violators. It may be true, as the defendant argues, that some balancing of values occurs when district attorneys ignore the reports in the popular press based upon anonymous confessions concerning drug use, abortions, and other activities in which law violations may have played a part.[9] This social phen-

menon, however, is not relevant to the defendant's underlying assumption that the "press" has a right to gather information superior to that which other members of society can assert. While the government from time to time extends to representatives of news media privileges (such as access to war zones and seats on a presidential aircraft) not accorded to the general public, it has not been suggested that these privileges are necessarily rights conferred by the Constitution solely upon those who can qualify as members of the press.

On the contrary, it has been held that those claiming to be news gatherers have no constitutional right to information which is not accessible to the public generally.[10]

In the decisions dealing with the reporter's asserted right to refuse to disclose his source of information, the courts have held that rights of privacy, freedom of association, and ethical convictions are subordinate to the duty of every citizen to testify in court.[11]

Indeed, it would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal-privileges and equal-protection concepts also found in the Constitution.[12] Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing. See Note, 46 Or L Rev 99 (1966).

Apart from the definitional difficulties in attempting to give constitutional status to a privilege for qualified news gatherers which presumably would be denied to less favored classes, there is another objection to discrimination between news gatherers and other persons. Such a practice would be potentially destructive of the very freedom that is sought to be preserved by this appeal. After the lessons of colonial times,[13] the First Amendment required the federal government to resist the normal temptation of rulers to regulate, license, or otherwise pass upon the credentials of those claiming to be authors and publishers. An invita-

tion to the government to grant a special privilege to a special class of "news gatherers" necessarily draws after it an invitation to the government to define the membership of that class. We doubt that all news writers would want the government to pass upon the qualifications of those seeking to enter their field.

The scope-of-employment test contemplated by typical statutes creating such privileges appears to approach the problem from two sides: (a) the person claiming the privilege is "engaged in the work of gathering," and (b) the material being gathered is "news." Statutory distinctions may or may not be made among the media to be used for dissemination.[14] The statutes generally omit any guidance as to what is "work" and what is "news."

Assuming that legislators are free to experiment with such definitions, it would be dangerous business for courts, asserting constitutional grounds, to extend to an employe of a "respectable" newspaper a privilege which would be denied to an employe of a disreputable newspaper;[16] or to an episodic pamphleteer; or to a free-lance writer seeking a story to sell on the open market; or, indeed, to a shaggy nonconformist who wishes only to write out his message and nail it to a tree. If the claimed privilege is to be found in the Constitution, its benefits cannot be limited to those whose credentials may, from time to time, satisfy the government.

Since we decline to attempt a constitutional definition of "news" and "news reporters," we have not discussed a secondary argument advanced in this appeal: that we should fashion for those eligible to enjoy it a privilege limited to cases in which secrecy is an aid to social criticism aimed at reforming the law.

We hold that there is no constitutional reason for creating a qualified right for some, but not others, to withhold evidence as an aid to newsgathering. We do not hold that the Constitution forbids the legislative enactment of reasonable privileges to withhold evidence.[17] That ques-

tion is not before us. We hold merely that nothing in the state or federal constitution compels the courts, in the absence of statute, to recognize such a privilege.

Affirmed.

FOOTNOTES

[1] "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Oregon Constitution, Art. I, Sec 5.

"Congress shall make no law *** abridging the freedom of speech, or of the press *** ." United States Constitution, Amendment I.

". *** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States *** ." United States Constitution, Amendment XIV..

[2] In the only case that has come to our attention in which this privilege was asserted to be a constitutional right and in which an appeal was taken to the Supreme Court of the United States, certiorari was denied. Garland v. Torre, 259 F2d 545 (2d Cir), cert. denied 358 US 910 (1958).

[3] "There are no particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: *** ." ORS 44.040. (List includes husband and wife, attorney and client, priest and penitent, physician and patient, public officer and official communication, stenographer and employer, professional nurse and patient, certified psychologist and client.)

[4] At common law only the priest, physician, and lawyer were recognized for testimonial purposes as parties to privileged communications, and each could be released only by the other party to the communication or by law in certain situations. It was not the identity of the privileged party that was to be protected, but the contents of the communication. At common law each of the privileged professionals was subject to rigorous intraprofessional discipline and, except for the priest in modern times, to governmental licensing and discipline as well.

[5] "*** Though there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information, – a canon worthy of respect and undoubtedly well founded, it is subject to a qualification, – it must yield when in conflict with the interests of justice, – the private interests involved must yield to the interests of the public." In the Matter of Wayne, 4 US Dist Ct Hawaii 475 (1914).

[6] "The public interest at stake in this contempt case is not that persuasive. If the district attorney and other law enforcement officers had done their own investigative work competently, they would not have had to try to coerce a college student to turn unwilling informer. It is to her credit that she refused to play their childish game." New York *Times*, June 29, 1966.

[7] A prototype of such privilege is found in HB 1020 (1967), Oregon House of Representatives, which provided in part as follows:

> "It is hereby declared to be the public policy that no person engaged in the work of gathering or disseminating news shall be required to disclose before any proceeding or by any authority the source of information procured by him in the course of such work unless disclosure be essential to prevent injustice or to protect the public interest, and an order for such disclosure is made by a court of competent jurisdiction."

The bill (which failed of enactment) is commented upon in Note, 46 Or L Rev 99 (1966).

[8] This view drew support from In re Taylor, 412 Pa 32, 193 A2d 181 (1963).

[9] Note, *The Right of a Newsman to Refrain from Divulging the Source of His Information*, 36 Va L Rev 61, 74 (1950).

[10] See e.g., Matter of United Press Assns. v. Valente, 308 NY 71, 123 NE2d 777 (1954); Tribune Review Publishing Company v. Thomas, 254 F2d 883 (3d Cir 1958); Brumfield v. State, 108 So2d 33 (Fla 1958). Cf. Seymour v. United States, 373 F2d 629 (5th Cir 1967) (upholding contempt conviction while assuming without deciding that restricting the gathering of news might in some cases be an abridgment of the freedom of the press).

[11] Garland v. Torre, supra note 2; In re Goodfader, 45 Hawaii 317, 367 P2d 472 (1961); In re Taylor, supra note 8.

[12] "*** nor shall any State *** deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV.

[13] The licensing acts, which prevailed in England during most of the period from Charles I until William and Mary, influenced the colonies by way of instructions to the royal governors. The following is representative:

> "And forasmuch as great inconvenience may arise by the liberty of printing within our said territory under your government you are to provide by all necessary orders that no person keep any printing-press for printing, nor that any book, pamphlet or other matters whatsoever be printed without your especial leave and license first obtained." Clyde A. Duniway, The Development of Freedom of the Press in Massachusetts, p. 65 (Longmans, Green and Co., 1906).

[14] See, for a purely statutory privilege, Application of Cepeda, 233 F Supp 465 (SD NY 1964), which held that a statute granting privilege to writers employed by a newspaper, press association, or wire service did not protect a journalist working for *Look* Magazine.

[15] See, e.g., HB 1020 (1967), supra note 7.

[16] Near v. Minnesota, 283 US 697, 721, 51 S Ct 625, 75 L Ed 1357 (1931).

[17] Our attention has been directed to the enactment in thirteen states of legislation which appears to create a statutory right of newspaper, radio, and television employes to reveal the contents of a communication without being required to reveal the name of its author:

Ala Code tit 7, Sec 370 (1958);
Ariz Rev Stat Ann Sec 12-2237 (Cum Supp 1966);
Ark Stat Ann Sec 43-917 (1964);
Cal Evidence Code Sec 1070 (1966);
Ind Ann Stat Sec 2-1733 (Cum Supp 1966);
Ky Rev Stat Sec 412.100 (1963);
La Rev Stat Secs 45:1451 to 45:1454 (Cum Supp 1965);
Md Code Ann art 35, Sec 2 (1965);
Mich Stat Ann Sec 28.945 (1) (1954);
Mont Rev Code Sec 93-601-1, 93-601-2 (1964);
NJ Stat Ann Secs 2A:84A-21, 2A:84A-29 (Cum Supp 1966);
Ohio Rev Code Ann Secs 2739.04, 2739.12 (Supp 1966);
Pa Stat Ann tit 28, Sec 330 (Cum Supp 1965).